U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. D.C.

DATE: September 23, 1992
CASE NOS. 81-CETA-224 and
81-CETA-311

IN THE MATTER OF

EARNESTINE GORDON,

COMPLAINANT,

v.

KANE COUNTY CETA, ILLINOIS,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801-999 (Supp. V 1981), [1/] and its implementing regulations, 20 C.F.R. Parts 675-680 (1990). The grantee, Kane County CETA, Illinois, filed exceptions to the Decision and Order (D. and 0.) of the Administrative Law Judge (ALJ) finding that the Complainant, Earnestine Gordon, had been improperly terminated from her employment with the County and awarding her back pay of $7,687.50. The case was accepted for review [2/] in accordance with 20 C.F.R. § 676.91(f).

[1/] CETA was repealed effective October 12, 1982. The replacement statute, the Job Training Partnership Act, 29 U.S.C. §§ 1501-1791 (1988), provides that pending proceedings under CETA are not affected. 29 U.S.C. § 1591(e).

[2/] The Secretary's review of the case was stayed pending judicial review of another issue in the case, the applicability of the "120-day" provision in section 106(b) of the Act, 29 U.S.C.

(continued...)

BACKGROUND

Complainant was hired on September 6, 1978, as an Education and Training Assistant in the grantee's Aurora field office. Transcript (T.) at 283; D. and 0. at 2. Her duties included preparation of grant modifications and applications for Field Office Education and Training Programs in conjunction with the Field Office Director. ALJ Exhibit 1, para. 2. In this position, Complainant was supervised by Cynthia Miller, a Field Office Director. T. at 284.

In March 1979, Complainant was assigned a grant package, although she did not receive the actual materials until June 6, 1979. T. at 203, 292; D. and 0. at 3. The due date for this assignment was June 20, 1979, but Complainant testified she thought the grant package was due July 2, 1979. Respondent's Exhibits 1, 2, 5; T. at 87, 151, 302.

On May 16, 1979, Complainant requested leave without pay for the week June 18-23, 1979, and Ms. Miller approved it "contingent on the date for the grant submittal." Administrative File (A.F.) Tabs B, I. Complainant withdrew her leave request on May 31, 1979. T. at 288.

2/ (. ..continued)
§ 816(b). This issue was raised by the County in its post-hearing brief before the ALJ alleging that the Grant Officer lacked jurisdiction to enter a final determination in the discrimination complaint, No. 81-CETA-224. The Supreme Court's decision in Brock v. Pierce County, 476 U.S. 253 (1986) resolved this issue, holding that the Secretary does not lose jurisdiction by virtue of the Grant Officer's failing to issue a final determination within 120 days of the date the complaint is filed. Accordingly, the stay is lifted.

On June 15, 1979, Complainant, who was approximately six months pregnant, saw her doctor because of related complications. Her doctor recommended that she discontinue normal activity and assume moderation and bed rest most of the time. T. at 10. The ALJ found that Complainant informed Ms. Miller that she would not be reporting for work the following week. D. and 0. at 3. Ms. Miller testified it was her understanding that Complainant would complete the grant before she took time off, T. at 168, whereas Complainant testified that Ms. Miller told her to stop working on the grant. T. at 302. The ALJ found that Ms. Miller attempted to reach Complainant on June 18 and 19 but was unable to do so. D. and 0. at 3. She thereafter left a message at Complainant's husband's office. On June 20, Complainant telephoned Ms. Miller and informed her that the grant materials were on Complainant's desk. **Id.**

Ms. Miller was unable to reach Complainant on June 18 and 19 because Complainant had accompanied her husband on a business trip to California that week. T. at 304. While there is a conflict in the testimony as to what Complainant said regarding her whereabouts during the June 20 telephone conversation, Complainant never told Ms. Miller that she was in California. She testified that she did not suggest that she was at home. T. at 305.

On June 20, Ms. Miller wrote a letter to Complainant requesting her resignation effective June 25, 1979. A.F. Tab I. Upon her return to work on June 25, Complainant responded in

writing that she did not plan to resign, A.F. Tab I, and presented a certificate from her doctor stating that she was totally incapacitated from June 18-23, 1979. A.F. Tab I. By letter dated June 25, 1979, Ms. Miller advised Complainant that her employment was terminated, effective the same day, for refusal to obey reasonable instruction in regard to those duties within the framework of the employee's job or other acts of insubordination and deceptive acts being committed. A.F. Tab B.

Complainant appealed the termination to the grantee's personnel department which upheld that action. Both the County Appeals Board and the Executive Committee reached the same conclusion. D. and 0. at 5; A.F. Tab B.

On February 22, 1980, Complainant filed a complaint with the Department of Labor contesting the merits of the termination. A.F. Tab B. In a final determination issued April 3, 1981, the Grant Officer concluded that the grantee violated its own procedures and 20 C.F.R. § 676.43 in terminating Complainant's employment. He therefore ordered her reinstatement and awarded back pay. A.F. Tab G.

The complaint also included an allegation that Complainant was discriminated against because she "was a pregnant Black American female." This allegation was investigated by the Department of Labor's Office of Civil Rights which, on June 15, 1981, issued a final determination concluding that there was no evidence of discrimination. A.F. No. 2, Tab 61.

The grantee requested a hearing on the Grant Officer's determination and Complainant asked for a hearing on the determination of the Office of Civil Rights. The cases were consolidated for purposes of the ALJ hearing. D. and 0. at 6.

The ALJ concluded that the facts in the case did not support the grantee's terminating Complainant's employment "for alleged refusal to obey reasonable justifications [sic] in regard to those duties within the framework of the employee's job." D. and 0. at 8. While the ALJ found that Complainant failed to demonstrate responsibility toward the grant proposal, he reasoned that her behavior merited a warning, but should not be cause for immediate discharge. As to the discriminatory firing charge, the ALJ found that Complainant failed to present a prima facie case in that the motivation for the discharge was Complainant's deceit. The ALJ ordered reinstatement of Complainant to the same or comparable position and expunging of all references to the termination in her personnel file. Id. at 9. Finding that Complainant's deceit with regard to her employer should be taken into account, the ALJ reduced the Grant Officer's back pay award by one-half. Id. at 11.

DISCUSSION

A. Discriminatory Discharge

Complainant challenges the finding of no discrimination on the ground that the Department of Labor's investigation was not sufficient to allow a valid determination to be made on that

issue. [3/] Complainant's Brief (Corn. Br.) at 4-5. The regulations provide that complaints alleging discrimination on the basis of race or sex shall be investigated in accordance with the procedures set forth at 29 C.F.R. Part 31. 20 C.F.R. § 676.86(b)(9). The applicable regulation, Section 31.7(a) states that the Secretary will make a prompt investigation which "should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part." (Emphasis added).

The final determination by the Office of Civil Rights states that "pertinent documents were reviewed and the parties to the complaint were interviewed." A.F. No. 2, Tab 61. Assuming, without deciding, that a complainant might have a remedy if there were an insufficient investigation, I conclude that this investigation satisfies the requirements of Section 31.7(c). Moreover, once a case proceeds to a hearing before an ALJ, the party requesting the hearing bears the burden of proof in establishing entitlement to relief. 20 C.F.R. § 676.90(b). The regulations provide that, if necessary, discovery is available to

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[3/] Complainant did not file exceptions to the ALJ's decision within 30 days. See 20 C.F.R. § 676.91(f). Inasmuch as Complainant's argument on this issue supports the judgment that she was wrongfully terminated from her employment, however, she need not have filed exceptions to argue the merits on appeal. U.S. Deoartment of Labor v. City of Tacoma, Washinston, Case No. 83-CTA-288, Sec. Ord., Oct. 24, 1990, slip op. at 3-4.

assist a party in establishing essential facts. I therefore conclude that Complainant was not prejudiced as a result of any insufficiencies which may have existed in the Department's investigation.

To make a prima facie showing of a discriminatory discharge, it is necessary to show by a preponderance of the evidence (1) membership in a protected class, (2) discharge, and (3) others were retained who engaged in activities comparably serious to the activity for which the complainant was discharged. Donahue v. Piedmont Aviation, Inc., 723 F.2d 921, 922 (D.C. Cir. 1983). See McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 281-83 (1976) (violation of Title VII where two white employees discharged for misappropriating cargo while black employee was not). Complainant in this case has failed to present any evidence that other employees of Kane County who were a different race, sex, or not pregnant were retained in their employment after engaging in conduct which was insubordinate, deceitful or otherwise comparably serious to the conduct for which she was discharged. See Donahue, 723 F.2d at 922. I, therefore affirm the ALJ's finding that Complainant has failed to establish a prima facie case of discriminatory discharge. Even if she had, Complainant did not sustain her burden to show that the asserted reasons for the discharge were pretexts for discrimination. Id.

B. Wronsful Termination

The applicable CETA regulation required grantees to establish a method of personnel administration in conformity with

the Standards for a Merit System of Personnel Administration, which incorporate the Intergovernmental Personnel Act Merit Principles prescribed in 5 C.F.R., Part 900, Subpart F. 20 C.F.R. § 676.43 (1979). The grantee's procedures for personnel administration were stated in the Kane County Employee Handbook. [4/] A.F. Tab K.

As noted previously, the grantee terminated Complainant's employment for refusal to obey reasonable instruction or other acts of insubordination and deceptive acts being committed. While the grantee does not contest the ALJ's finding that termination for refusal to obey reasonable instruction was improper, see Grantee's Brief (Gr. Br.) at 1-2, it alleges that the ALJ ignored deceptive acts as a basis for termination. Id. The grantee contends that deceptive acts are encompassed within

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[4/] The handbook listed the following reasons as justification for immediate, on the spot, discharges:-

a) Refusal to obey reasonable instruction in regard to those duties within the framework of the employee's job or other acts of insubordination.

b) Stealing or improper removal of items belonging to fellow employees or to the County.

c) Intoxication or drinking on the job.

d) Possession or being under the influence of drugs.

e) Disorderly conduct or illegal activity.

f) Deliberately falsifying time cards, records, reports or employment application.

g) Other causes judged to be valid by the Supervisor/Department Head.

paragraph (g) of the reasons- for discharge, "[o]ther causes judged to be valid by the Supervisor/Department Head." Id. at 2.

Although paragraph (g) articulates a broad standard for termination, regulations which define standards for employee job security need not be drawn with the same precision as the criminal code. The question is whether an ordinary person using ordinary common sense would be fairly on notice from the regulation that the conduct with which he is charged could cost him his job. D'Acquisto v. Washinaton, 640 F. Supp. 594, 620 (N.D. Ill. 1986) (regulation authorizing suspension of police officer "for the good of the Department" not unconstitutionally vague). See Arnett v. Kennedy, 416 U.S. 134, 159 (1974) (provision which allows discharge of federal employee "for such cause as will promote the efficiency of the service" [currently codified at 5 U.S.C. § 7513(a) (1988)] neither overbroad nor vague). The issue of whether an employee should be discharged on this basis invokes the discretion of the agency involved and if such action is taken against an employee in good faith it will be affirmed. Masino v. United States, 589 F.2d 1048, 1054 (Ct. Cl. 1978).

While, as the grantee alleges, the ALJ did not consider deceptive acts as supportive of Complainant's discharge, he concluded that Complainant had been deceitful with regard to her employer, D. and 0. at 11, and gave several reasons to support that conclusion. The ALJ stated that had Complainant remained home and fully informed her supervisor of her plans, Ms. Miller

would have had an opportunity to timely complete Complainant's portion of the grant proposal by the due date. He also stated it was an unreasonable assumption that an employee of Complainant's qualifications should have neglected to confirm an expected due date of a project involving agency funding prior to taking an extended leave from work. The ALJ concluded that "[t]he impetus for the firing was that Ms. Gordon had placed herself in a situation where she avoided telling her supervisor the truth" and Ms. Miller, therefore, was forced to complete the project. D. and 0. at 8-9 (emphasis added).

Although Complainant testified that she thought the grant proposal was due July 2, she had to have known that the due date was a concern to her supervisor because when Complainant first requested leave for June 18-23, the week she ultimately took off for health reasons, it was approved contingent on the date for the grant submittal. Under these circumstances, she should have either confirmed the due date, as the ALJ suggested, or made sure she was available in case her supervisor had questions. By telling her supervisor that her doctor recommended discontinuing normal activity and maintaining bed rest most of the time, Complainant left the clear impression that she would be at home. In remaining silent as to her proposed whereabouts for the week of June 18-23, Complainant was deceptive in that, as the ALJ concluded, she avoided telling her supervisor the truth. [5/]

[5/] For purposes of this appeal, I need not decide whether Complainant, who had medical justification for being absent from

(continued...)

From the foregoing, I conclude that the employee handbook provisions on discharge were sufficient to put Complainant on notice that her deceptive conduct could cost her her job, D'Acquisto, 640 F. Supp. at 620, and that the grantee acted in good faith in terminating her employment. Masino, 589 F.2d at 1054. The ALJ's finding that the grantee improperly discharged Complainant is therefore reversed. [6/]

CONCLUSIONS AND ORDER

For the foregoing reasons, I conclude that Complainant has failed to establish that her discharge was motivated by race, sex or pregnancy discrimination or that it was improper under the provisions of the grantee's employee handbook. Accordingly, her complaint is dismissed.

SO ORDERED.

Lynn Martin
Secretary of Labor

Washington, D.C.

[5/](...continued)
work the week of June 18, was entitled to spend that week in California instead of at home in Illinois.

[6/] In view of the outcome of this case, I need not address the due process and back pay issues raised by the grantee or the attorneys fee issue raised by Complainant.

CERTIFICATE OF SERVICE

Case Name: In the Matter of Earnestine Gordon v. Kane County CETA. Illinois

Case No. : 81-CETA-224 and 81-CETA-311

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on SEP 23 1992.

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